**BEFORE THE**

**STATE OF CALIFORNIA**

**OCCUPATIONAL SAFETY AND HEALTH**

**APPEALS BOARD**

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| In the Matter of the Appeal of:<br><br>MCDONALD'S<br>2401 University Avenue<br>East Palo Alto, CA 94303<br><br>Employer | Docket Nos. 03-R1D3-4116<br>and 4117<br><br>**DECISION AFTER RECONSIDERATION** |

The Occupational Safety and Health Appeals Board (Board) issues the following decision after reconsideration, pursuant to the authority vested in it by the California Labor Code.

## JURISDICTION

McDonald's (Employer) operates a fast food restaurant located at 2401 University Avenue, East Palo Alto, California. The Division of Occupational Safety and Health (the Division) cited Employer for violating sections 342(a), 3319(e) and 3319(c) of the occupational safety and health standards contained in California Code of Regulations, Title 8. Employer timely appealed the citations and a hearing was held before an Administrative Law Judge (ALJ) on September 27 and 28, 2005. The ALJ rendered a decision on December 15, 2005 in which she upheld the citations.

The Board took reconsideration of this matter on its own motion on January 13, 2006 and the Division filed an answer in response, on February 17, 2006. Employer subsequently submitted a petition for reconsideration on January 19, 2006, which was also granted.[1]

[1] Employer also submitted an objection and motion to strike the Division's brief on reconsideration, dated February 22, 2006, in which it contended that the Division's brief was untimely. The Division filed an opposition to Employer's motion, dated February 24, 2006, and cited the relevant Board rules of practice and procedure contained in Title 8 that rendered its brief timely. The Board concurs with the argument asserted in the Division's opposition brief and finds that the Division's answer to the Board's order of reconsideration was submitted in a timely fashion.

**FINDINGS AND REASONS**
**FOR**
**DECISION AFTER RECONSIDERATION**

The Board has fully reviewed the record in this case, including the testimony at the hearing and the documentary evidence admitted, the arguments of counsel, the decision of the ALJ, and the arguments and authorities presented in the petition for reconsideration. In light of all of the foregoing, we find that the ALJ's decision was proper, that the decision was based on substantial evidence in the record as a whole, and that the findings of fact support the decision. Therefore, we adopt the attached ALJ's decision in its entirety and incorporate it into our decision by this reference.

**DECISION AFTER RECONSIDERATION**

The decision of the ALJ dated December 15, 2005 is reinstated and affirmed.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: May 31, 2007

## BEFORE THE

## STATE OF CALIFORNIA

## OCCUPATIONAL SAFETY AND HEALTH

## APPEALS BOARD

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|---|---|
| *In the Matter of the Appeal of:*<br><br>**McDONALD'S**<br>2401 University Ave.<br>East Palo Alto, CA 94303<br><br>Employer | **DOCKET NOS. 03-R1D3-4116 and 4117**<br><br>**DECISION** |

## Background and Jurisdictional Information

Employer operates a fast food restaurant. On July 29, 2003, the Division of Occupational Safety and Health (the Division), through Associate Industrial Hygienist Paul Guiriba (Guiriba), conducted an accident investigation at a place of employment maintained by Employer at 2401 University Avenue, East Palo Alto, California (the site). On September 26, 2002, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations[2]:

| Citation/Item | Section | Type | Proposed Penalty |
|---|---|---|---|
| 1/1 | 342(a) [failure to report serious injury to DOSH) | Regulatory | $5,000 |
| 1/2 | 3319(e) [failure to ensure approved portable container used when refueling a pressure washer machine with a flammable liquid] | General | $700 |
| 2/1 | 3319(c) [failure to ensure refueling of pressure washer with flammable liquid from portable container not performed near open flame] | Serious | $14,400 |

Employer filed a timely appeal contending that the safety orders were not violated and the classifications alleged in Items 1 and 2 were incorrect.

This matter came on regularly for hearing before Bref French, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Oakland, California, on September 27th and 28th, 2005. Employer was represented by George Holland, Jr., Attorney at Law. The Division was represented by Michael Frye, District Manager. Oral and documentary evidence was introduced by the parties and the submission date was extended to October 26, 2005, to accommodate the parties briefing schedule. On her own motion, the undersigned ALJ continued the submission date to November 28, 2005.

[2] Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

**Docket 03-R1D3-4116**

Citation 1, Item 1, Regulatory, § 342(a)

Citation 1, Item 2, General, § 3319(e)

**Docket 03-R1D3-4117**

Citation 2, Item 1, Serious § 3319(c)

**Summary of Evidence**

Employer was cited in Citation 1, Item 1, for failing to report a serious injury to the Division. Employer was cited in Citation 1, Item 2, for failing to ensure that a maintenance employee used an approved safety type portable container with a flame arrester and automatic closing cap when refueling a pressure washer machine with gasoline. Employer was cited in Citation 2 for failing to ensure that the refueling operation was not conducted near an open flame - the pilot light in a hot water heater.

Mariano Jimenez Alcantara (Alcantara) testified for the Division through a state-certified Spanish language interpreter that on July 17, 2003, he was injured while working as a janitor for Employer. Alcantara identified Exhibit 3 as a photograph of the "gasoline powered machine" (hereinafter referred to as "the machine" since Alcantara testified that he did not know the name of the machine). He uses the machine to clean the floors and the "drive-thru" area outside where customers pick-up food. He also identified Exhibit 3 as depicting the red, plastic "gas can" that he used. On the morning of the accident, Alcantara got the machine and gas can from the "small room" outside where they were stored, which room he identified as depicted in Exhibit C. He pushed the machine, which is on wheels, to the utility room in the restaurant and brought the gas can with him because "the water faucet is closer over there."

Alcantara identified Exhibit 2 as a photograph of the "utility room" where the accident occurred. He stated that he had positioned the machine "off to one side of the door [depicted with a yellow door jam]," which door appears in a closed position in Exhibit A. The "front of the machine" was on one side of the doorway but the machine's gas tank was "inside the walls of the room." On cross-examination, he stated that the door was open and the machine was in the yellow doorway but not completely in the room. He marked the location of the water heater on photograph Exhibit 2 and where he had placed the gas can on the floor prior to the accident.

At the time of the accident, he was standing inside the room in front of the machine approximately "one and a half meters" from the water heater. The machine was "never next to the water heater" and the gas tank on the machine was approximately "two meters" from it. He took the lid off of the gas tank on the machine, which lid and machine he identified as depicted in photograph Exhibit 8. The gas cap was still on the gas container when he brought it over to the machine. He was "about to pour gasoline into the machine" when he felt heat and a "flash flame." The spout on the gas can, which he stated was "13-centimeters" long, was "about 14-centimeters" from the machine's gas tank opening when this occurred.

Alcantara then testified that he was "filling up the machine with gasoline from the gas can" but he did not know how much gas he had poured into the tank before "the flame" happened. He did not "notice" if he "spilled" any gas when he opened the gas can cap or as he poured the gas into the tank. He stated that the gas can had an "auto close feature" or "automatic closer" that one can "move up and down" – if you "take your finger away, it closes or drops down automatically."

Alcantara identified Exhibits 5 and 6 as photographs of the burn injuries to his right and left forearms, respectively. He was taken to Stanford Hospital immediately after the accident where he received first-aid treatment. He returned the next day and was sent to another hospital in Santa Clara where he stayed in the burn unit for "almost four days." He stated that his arms are not "disfigured" from the burn injuries; he does not have any "scars – just a little discolored, but no mark."

Nelva Chavez (Chavez), who Alcantara identified as the "store manager", came to visit him in the hospital. Chavez and "another manager who tells people what to do (Thompson)," were working at McDonalds on July 17th. Neither of them saw him in the utility room prior to the accident nor told him to use the machine to clean any area. He stated that "one already knows what one has to do to clean with that machine." Neither Chavez nor Thompson told him to take the machine and gas can to the utility room that morning. Another employee trained him to start the machine outside and showed him how to fill up the gas tank. He was unable to identify the content of a statement purporting to be his statement to Guiriba (Exhibit 7).

Ronald Keefer (Keefer) testified for the Division that he is an Assistant Fire Marshall for the Menlo Park Fire District (MPFD). He responded to McDonalds on July 17, 2003, and subsequently wrote a supplement investigation report, which Keefer identified as Exhibit 9 (page 3). Based on his observations in the room (depicted in Exhibit A), he opined that the pilot light in the water heater was the "ignition source" and the gasoline that the injured

worker indicated he was "pouring from a gas can into the power washer" was the "fuel source." Gas vapors, which are heavier than air, ignited causing a fire. When the gasoline was poured, the vapors fell to the ground and moved through out the room. Air currents would move the gas vapors through out the room even if the power washer was in the open doorway. The "heat source" at the hot water heater was near the floor. He "ruled out" any other source of ignition, such as "electrical sources", which were "higher up" in the room. There was no "heavy charring – everything was sooty", which indicated to him that it was not a prolonged fire as would occur from an electrical fire. The burn pattern through out the room showed a "quick burning flash flame." Keefer did not take any measurements, photographs, or "check" the flow of air currents in the room.

Keefer identified the machine depicted in Exhibit 3 as the "power washer machine" that he saw in the utility room and marked its location on photograph Exhibit A (whereon he wrote: "power washer"). The power washer was not running when he first saw it so he ruled it out as the source of ignition. He identified the plastic gas container depicted in Exhibit 3 as the one that the injured employee was using, which he saw "outside the door." The fire-fighters told him that the injured worker had it with him inside of the room and they took it outside. The gas can did not have an "automatic closing cap" but Keefer did not know if it had a flame arrester since he did not open it.

Donald J. Perkins (Perkins) testified for the Division. Employer stipulated that Perkins was "an expert in fire investigation." Based on having reviewed Exhibit 9 and some of the photographs, Perkins opined that ignitable ("flammable") liquids or spilled liquids resulted in a flash fire at Employer's establishment on July 17, 2003. He further opined that the gas vapors, which are "3 to 4 times heavier than air", produced from the pouring of gasoline into the machine's compressor tank were "insufficient" to cause the fire. Air currents or "walking about" in the utility room would "churn up" or pull the gas vapors "in multiple directions." When the vapors reached the pilot light on the hot water heater, they would burn, producing soot. The "light soot" and "very light char with no depth to it" indicates that the vapors burned and not liquid gasoline.

Perkins stated that the "yellow door" depicted in Exhibit 2 was 6-feet away from the hot water heater. He opined that the injured worker's burns were consistent with him being "in the vapor field" in the doorway while bending over to pour gas into the power washer. If the injured worker had pulled back on the lever on the gas can spout to release the gas but had not release it, which would automatically close the spout, he could have spilled some gas. If gas had not spilled, there would not have been enough vapors in the room to ignite. It is "not possible" that the gas was spilled outside the room. In that event, there would be no "charring" inside the room.

On cross-examination, Perkins acknowledged that the "remarks" section in the fire investigation report (Exhibit 9: pg 2) did not indicate that the injured worker had spilled any gasoline. Perkins opined that if the worker had been "pouring correctly" there would not have been any fire. If the gas can spout had been "properly" put into the power washer's gas tank, there would not have been sufficient quantity of vapors to spread as they would have been diluted in the air. The concentration of vapors would be "more intense" from a gas spill. Any attempt to put gasoline in the power washer should have been done outside the building.

Perkins stated that photographs of the injured worker's arms (Exhibits 5 and 6) show "second degree" burns (9% on each arm). Second degree burns occur when the first layer of skin is burned, causing "blisters and redness." He acknowledged that the remarks section of the fire department's report indicates that Alcantara suffered "minor burns to his arms and face." (Exhibit 9: pg 2)

Associate Industrial Hygienist Paul Guiriba testified for the Division that he investigated an accident that occurred at Employer's fast food restaurant on July 17, 2003. Guiriba identified Exhibit 10 as the Division's "Accident Report", which shows that the MPFD reported an accident wherein employee Alcantara received a burn injury. Guiriba stated that there were "no other reports" of the injury to the Division.

On July 29, 2003, Guiriba went to the site and conducted an opening conference with Darrah Thompson (Thompson), who identified herself as Employer's assistant supervisor. Thompson stated that she saw Alcantara, a janitor, in the utility room immediately after the accident. He told her that he had been pouring gas into what she described as the "pressure washer machine" (which she identified as depicted in Exhibit 2). Thompson said that it was part of Alcantara's "regular job" to wash the drive-way with the pressure washer; and that she had not assigned the job to him that day. She saw that the exterior door leading to the back parking lot (to the left of the entryway but not depicted in Exhibit 2) was closed. The pressure washer was "4 to 5-feet" away from the water heater, which was "on" as the restaurant had hot water.

Guiriba identified Exhibit 2 as a photograph of the utility room that he took on July 29, 2003. It does not show any charring or soot on the walls. Guiriba did not take any measurements of the room. He identified Exhibit 3 as a photograph he took of the pressure washer and gas container that Thompson pointed out to him as the equipment Alcantara used during the accident. Guiriba observed that the gas container did not have a "self-closing cap" that would close automatically when released. The cap, which had to be opened and closed manually, opened when turned counter-clockwise. Guiriba identified Exhibit 11 as an illustration of a safety gas container with a hinged,

self-closing cap, which "you flip with your thumb, and it closes automatically when you let go of it." The gas container also did not have a "flame arrester", which is a metal mesh device inside of the container that cools down the fuel as it is poured out.

Guiriba interviewed Nelva Chavez, who told him that she was "in charge of the restaurant." She told Guiriba that she directed Alcantara to wash the parking lot with the power washer but she did not tell him when she had done so. Guiriba identified Exhibit 13 as Employer's report of occupational injury or illness that he received from Employer.

Guiriba interviewed Alcantara with a Spanish-speaking interpreter – a friend of Alcantara's who was not a state-certified interpreter. Alcantara told him he had been in the hospital "3 ½ or 4 days" and gave Guiriba his "medical record" from the hospital, which Guiriba identified as Exhibit 12. Guiriba took photograph Exhibits 4 through 6 which depict Alcantara's forearms after the incident.

Guiriba issued Citations 1 and 2. He classified Citation 2 as serious because "if someone was filling a gas tank next to an open flame", there was a "substantial probability of a serious injury" in the event of a fire. Guiriba based his conclusion that "the gas container exploded" (Exhibit 10: Accident Report) on officer Keefer's remarks in his report (Exhibit 9). When Guiriba filled out Exhibit 10, he did not know if Alcantara had suffered a serious injury. He alleged in Citation 2 that the power washer was "next to" the water heater based on what he was told by Alcantara and Thompson. He acknowledged that neither his interview notes from what Thompson told him, which he identified as Exhibit 15, nor his notes from his interview with Alcantara (Exhibit 14), state that the machine was "next to" the heater. Thompson told him that the "yellow door" was closed after the accident but he did not put this in his interview notes.

Nelva Chavez testified for Employer that on July 17, 2003, she was the store manager responsible for supervising Alcantara. She stated that she did not tell Alcantara to pressure wash any area. She explained that Alcantara "already knows what he is going to do" because she posts a "maintenance pre-checklist" for each day's work with his daily tasks on it (in English and Spanish) on the wall, which list is prepared by the owner, Anthony Ewell (Ewell). Chavez will "follow-up" to make sure the work is done. Chavez identified photograph Exhibit 3 as depicting the pressure washer machine and gas container that Alcantara used at the time of the accident. The machine and empty gas container were kept in a storage room, the exterior of which is depicted behind a poster in Exhibit C.

Chavez stated that Alcantara had pressure washed the parking lot with the machine "lots of times before"; that he was "the only one to use it"; and that he had been trained to operate the machine by "Avelino", Employer's maintenance manager. Prior to July 17, 2003, Alcantara never brought the pressure washer or gas container inside the restaurant. Chavez did not see Alcantara bring the pressure washer into the restaurant prior to the accident. She did not see Alcantara that day until she heard an "explosion" and went to the "washing machine room", depicted in photograph Exhibit 2. Alcantara was trying to unlock the fire extinguisher to put out a fire. The pressure washer was in the middle of the yellow doorway, which location Chavez marked on Exhibit A. She did not see the gas container.

Anthony Ewell testified for Employer that he is a part-owner of the restaurant. Chavez called him to notify him of the accident. He responded to the site and spoke with the Menlo Park Fire department. It is not "normal procedure" for Alcantara to bring the pressure washer into the utility room, which room Ewell identified as depicted in photograph Exhibit 2. Employer's maintenance manager used a maintenance checklist to instruct Alcantara to power wash the parking lot bi-weekly and to put gas into the machine outside of the restaurant. Ewell prepared Exhibit 13 (Employer's report of occupational injury or illness) for his insurance company based on what was reported to him by Thompson, Chavez and the MPFD. Ewell hired a private investigator to investigate the accident but they could not determine the cause of the accident.

## Docket 03-R1D3-4116

Citation 1, Item 1, Regulatory, § 342(a)

## Findings and Reasons for Decision

**The Division proved that Employer did not report a work-related serious injury to the Division in a timely manner. A violation of § 342(a) is established. The violation was properly classified as regulatory.**

The Division cited Employer in Citation 1, Item 1, for violating § 342(a) for failing to report a serious injury to the Division. Section 342(a) states:

> Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.
>
> *Immediately* means as soon as practically possible but not longer than *8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury* or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident. (Emphasis added.)

*Serious injury or harm*, as defined under Labor Code § 6302(h), includes any employment-related injury or illness that requires at least 24 hours of hospitalization for treatment (not observation) or that involves a loss of a member of the body or any serious degree of permanent disfigurement.

In Appeals Board proceedings, the Division has the burden of proving a violation by a preponderance of the evidence[3] (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983) since Appeals Board hearings are civil in nature. (*Lee Bolin & Associates*, Cal/OSHA App. 80-720, Decision After Reconsideration (July 29, 1981).) Generally, that includes the burden of proving that the injury met the definition of "serious." The Division concedes that the only basis for a "serious" injury is that, in this incident, the length of the hospitalization for other than observation was at least 24 hours.

Although Employer argues in its written Closing Argument (at page 6) that Employer was not required to report the "minor injuries" that Alcantara sustained, it did not refute Alcantara's credible testimony that he was in the

[3] "Preponderance of the evidence" is usually defined in terms of *probability of truth*, or of evidence that, when the quality of which is weighed with that opposed to it, has *more convincing force and greater probability of truth.* (See *Lesslie G. v. Perry & Associates* (App. 2 Dist. 1996); 43 Cal.App.4th 472 [review denied]; *In Re Michael G.* (App. 4 Dist. 1998) 63 Cal.App.4th 700; and *Witkin, California Evidence,* 4th Edition, vol.1, § 35.)

burn unit at a hospital in Santa Clara for "almost four days" as a result of the fire following the explosion of the gas container. Undoubtedly he received treatment for his burn injuries during that time. Alcantara's unrefuted testimony is credited.

Associate industrial hygienist Guiriba's credible testimony establishes that Employer did not report the serious burn injury received by employee Alcantara to the nearest District Office of the Division. The Division produced the official record – its Accident Report form (Exhibit 10) that it uses to record notifications of a serious injury accident – which shows that the MPFD reported the injury. Although Guiriba did not testify that he personally searched the Division's records to determine if Employer, in addition to MPFD, had reported the serious injury (or the Division's custodian of records diligently searched for Employer's report), he stated that were "no other reports" to the Division of the serious injury.

It is found that the Division established a *prima facie*[4] case sufficient to shift to Employer the burden of producing evidence that it had reported the injury. "Where the Division presents evidence which, if believed, is of such a nature as to support a finding if unchallenged, then the burden of producing evidence shifts to Employer to present convincing evidence to avoid an adverse finding as to Employer.[5]" (*Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004); see also *Lockheed California Company*, Cal/OSHA App. 80-889, Decision After Reconsideration (July 30, 1982).) Neither Employer's manager (Chavez) nor its part-owner (Ewell) testified that Employer reported Alcantara's injuries to the Division in a timely manner. Therefore, a violation of § 342(a) is established.

Employer challenged the classification of Item 1 as regulatory but it did not challenge the reasonableness of the proposed civil penalty. Had it done so it would have automatically raised the issue of the violation's classification, since classification directly affects the penalty amount,[6] and the issue of

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[4] "A *prima facie case* is one in which the evidence in favor of a proposition is sufficient to support a finding in its favor, if all of the evidence to the contrary can be disregarded." (Black's Law Dictionary, Revised Fourth Edition, at page 1353).

[5] 1 Witkin, Cal. Evidence (4th ed. 2000) Buren of Proof and Presumptions, § 2; see also Evid. Code § 550(a).

[6] Section 361.3(a)(5) provides in part:

> If the appeal contests only the reasonableness of the proposed penalty, the issues on appeal shall be limited to the classification of the violation and the reasonableness of the proposed penalty, . . . .

whether the Division could or should have issued a Notice in Lieu of Citation, without a penalty, as permitted by Labor Code § 6317. Hence, the amount of the $5,000 proposed penalty is not at issue.

Section 334(a) uses failure to report accidents as an example when it defines a "regulatory violation" as:

> . . . a violation, other than one defined as Serious or General that pertains to permit, posting, recordkeeping, and reporting requirements as established by regulation or statute. For example, failure to obtain permit; failure to post citation, poster; failure to keep required records; *failure to report industrial accidents*, etc. [Emphasis added.]

The mere fact that a cited condition pertains to one of the named examples does not automatically render it a regulatory violation (rather than a general violation). In *Santa Fe Mechanical Company, Inc.*, Cal/OSHA App. 94-2087, Decision After Reconsideration (June 9, 1999), the Appeals Board held that if a violation "has an impact on employee safety, it is classified as general or serious and cannot be a regulatory violation." The record is devoid of any evidence of the violation's impact on employee safety. Therefore, it is found that the regulatory classification for a failure to report violation is correct.

**Docket 03-R1D3-4116**

Citation 1, Item 2, General, § 3319(e)

**Findings and Reasons for Decision**

**The Division proved that a portable gas container used by an employee during a fueling operation was not equipped with an automatic closing cap and flame arrester. A violation of § 3319(e) is established. The violation was properly classified as general.**

Section 3319, which pertains to "Fueling", states in subsection (e) that:

> "Refueling with portable containers shall be done with approved safety type containers equipped with an automatic closing cap and flame arrester."

Associate industrial hygienist Guiriba testified that on July 29, 2003, he inspected the gas container that Thompson, Employer's assistant supervisor,

advised him Alcantara had been using to pour gasoline into the pressure washer immediately before the explosion and fire. The gas container, as depicted in the photograph he took of it (Exhibit 3), was not equipped with a cap that would close automatically when released but rather the cap had to be turned manually to unscrew or close it. Guiriba also observed that it did not have a flame arrester—a metal mesh device inside of the container to cool down the fuel as it is poured out the spout. Employer did not raise a hearsay objection to Guiriba's testimony as to what Thompson told him. Under the rules of practice and procedure adopted by the Appeals Board, unless a party makes a timely objection to the introduction of hearsay evidence at a hearing, the hearsay itself may support a finding of fact. (See § 376.2[7] as amended by Government Code § 11513(d).) Guiriba's testimony regarding his observations and the information he received from Employer's management is credited.

Assistant Fire Marshall Keefer (MPFD), who responded to the site shortly after the fire occurred, identified the plastic gas container depicted in Exhibit 3 as the one he observed outside a door to the utility room. Like Guiriba, he testified that it did not have an "automatic closing cap." Employer's counsel did not object to Keefer's hearsay testimony as to what the fire-fighters had told him, to wit, that "the injured worker had it [the gas container depicted in Exhibit 3] with him inside of the room and they took it outside." Hence, Keefer's testimony that the gas container in question did not have an automatic closing cap is credited.

Alcantara identified the red, plastic, gas container depicted in Exhibit 3. When the Division asked him a compound question—if the gas container had an automatic close *or* flame arrester on it—he only answered that it had an "automatic closer." He said the closer could "move up and down" – if you "take your finger away, it closes or drops down automatically." Employer argues that Alcantara "only spoke Spanish", and hence could not have given the statements attributed to him in English following the accident. Employer, however, acknowledges that Alcantara had "difficulty understanding the Spanish interpreter during his testimony." (Employer's Closing Argument (pages 4 and 5). His difficulty may well have been in understanding the Spanish language rather than proof that he could not speak English. Hence, it is possible that Alcantara misunderstood the question posed by the Division and was not describing the gas container that <u>he</u> used at the time of the accident but rather was relating his knowledge of the "automatic close feature" found on some gas containers.

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[7] Section 376.2 states, in pertinent part, that: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration."

At any rate, Alcantara did not appear to have a clear recollection of the events surrounding the accident and seemed uncertain of his answers. He was not a very credible witness, particularly since he gave conflicting testimony as to whether or not he was pouring gasoline into the tank of the machine, or "about to" pour it in, when the flash flame fire occurred[8]. The plastic gas container depicted in Exhibit 3 has a handle to grip the container and what appears to a cap with a small knob in the center. The actual "spout", which Alcantara described as "13-centimeters" long, is not depicted in the photograph. The photograph does not show any hinged device on or above the cap that could be manipulated with a thumb to open or pull back the small knob or cap. Therefore, Alcantara's testimony that the gas container had an automatic closer is not credited.

Finally, the Division called Donald J. Perkins as an expert witness. Although Employer stipulated that Perkins was "an expert in fire investigation", Perkins' Curriculum Vitae (CV), which Employer's counsel reviewed, was not introduced into evidence. Perkins did not identify his current occupation, work history, or educational background. Hence, on this record, his opinion that Alcantara was not pouring the gas "correctly" and may have failed to release "the lever on the gas can spout" lacks foundation and is purely speculative. Perkins was not asked to identify the photograph depicting the gas container, which Alcantara identified as the one he used (Exhibit 3), or if the gas container had an automatic closing cap or flame arrester on it. Nor did Perkins describe how the spout worked on the container depicted in Exhibit 3. Hence, Perkins' testimony as to Item 2 is irrelevant.

When given the opportunity to cross-examine Chavez, Employer's store manager, and the owner (Ewell), the Division did not inquire if the gas container in question had an automatic closing cap *and* flame arrester. However, Keefer and Guiriba's credible testimony establishes that the gas container that Alcantara used had neither an automatic closing cap nor a flame arrester. Therefore, a violation of § 3319(e) is established.

The Division classified the violation as general. General violations are those which, while of a lesser gravity than serious violations, have a

[8] In one version of the events, he testified that he placed the gas container on the floor at the location he marked on Exhibit 2. He opened the lid on the machine's gas tank and brought the gas can over to the machine with the "gas cap still on" the container. He was "about to pour gasoline into the tank—the gas container's spout was "approximately 14 centimeters" from the gas tank—when the flash fire occurred.

relationship to occupational safety and health[9]. An employer's knowledge of the existence of the violation is not necessary to support a violation classified as "general." (*Green and Hemly, Inc.*, Cal/OSHA App. 76-435, Decision After Reconsideration (Apr. 7, 1978).) The Division need only show that employees of the cited employer were exposed to the hazard addressed by the safety order, in order to sustain the violation. (See *Rudolph & Sletten, Inc.*, Cal/OSHA App. 80-602, Decision After Reconsideration (Mar. 5, 1981); *Wickes Forest Industries*, Cal/OSHA App. 79-1269, Decision After Reconsideration (Oct. 31, 1984).) Here, the violation has an impact on employee safety and is properly classified as general. (See *Santa Fe Mechanical Company, Inc.*, *supra*.)

**Docket 03-R1D3-4117**

Citation 2, Item 1, Serious, § 3319(c)

**Findings and Reasons for Decision**

**Employer failed to prohibit an employee from refueling a pressure washer machine with a flammable liquid (gasoline) near an open flame – a pilot light in a water heater. The Division established a violation of § 3319(c), by a preponderance of the evidence.**

Section 3319 states in subsection (c) that:

> "Open lights, open flames, or sparking or arcing equipment, except that which is an integral part of automotive equipment, shall not be used near fuel storage tanks or internal combustion engine equipment while being fueled with flammable liquids."

Employer did not challenge Alcantara's testimony that the machine was equipped with an internal combustion engine. Alcantara's testimony that the "machine" (subsequently identified by other witnesses as a pressure washer) had an internal combustion engine is credited. As discussed below, it is found that the Division established through the credible testimony of witnesses Guiriba and Keefer that Alcantara was refueling the pressure washer with gasoline—a flammable liquid—and that the water heater pilot light was an *open flame*.

[9] Section 334(b) defines a general violation as follows: "General Violation -- is a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees."

Although Alcantara gave conflicting versions as to whether or not he was pouring gasoline into the machine's tank, or "about to" do it immediately prior to the flash flame fire, it is clear from his testimony that he was inside the utility room that housed the water heater standing in front of the pressure washer machine, and that the gas container was in front of the doorway, as he marked on Exhibit 2. He claimed that the pressure washer and its gas tank were in the open doorway that leads outside (as he also marked on photograph Exhibit 2). Assistant Fire Marshall Keefer (MPFD) concluded from what he was told by Alcantara when he arrived on the scene that Alcantara was engaged in refueling the power washer *at the time* of the explosion and subsequent fire.[10] Keefer's testimony, including that Alcantara spoke English and that he had no difficulty in understanding him, is credited.

Guiriba's testimony about his conversation with assistant supervisor Thompson during the Division's opening conference corroborates Keefer's testimony. Thompson told him that when she saw Alcantara in the utility room after the explosion, Alcantara said that he had been "pouring gas" into what she described as the "pressure washer machine." She pointed out the gas container and machine to Guiriba, who photographed it in Exhibit 3. The record is silent as to whether she spoke to Alcantara in English or Spanish, however, it is unlikely that she translated what was said from Spanish to English without bringing this to Guiriba's attention. Employer did not raise a hearsay objection to Thompson's statements to Guiriba,[11] hence, the statements are deemed credible and are admissible.

Employer argues that it was "false that the cause of flame was the water heater." (Employer's Closing Argument (page 5). However, the Division's evidence preponderates in favor of a finding that the pilot light on the water heater was lit. Thompson told Guiriba that the water heater was "on" as the restaurant had hot water. As noted above, Employer did not raise a hearsay objection to Thompson's statements to Guiriba. Therefore, it can reasonably be inferred from her statement that there was an "open flame"—the water heater's pilot light.

Employer further contends that the violation should be dismissed because Alcantara did not fuel the pressure washer machine *near* an open

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[10] In his supplement investigation report (Exhibit 9: page 3), Keefer wrote that Alcantara told him that that he was inside the building "at the utility closet refueling a power washer with gasoline - pouring the gas into the fuel tank" when a sudden flash fire occurred.

[11] Unlike the Division, Employer did not request a standing objection to hearsay at the hearing. It did not raise that objection in its written Closing Argument brief.

flame. Employer points out that the water heater (depicted in Exhibit 2) is at the other end of the utility room away from the doorway. It argues that Alcantara testified credibly that the front part of the machine was in the open doorway about "two meters" from the water heater when he refueled it; and that two meters are equivalent to "approximately six feet" (Employer's Closing Argument: page 3). Keefer identified the pressure washer machine depicted in Exhibit 3 as the one that he saw *inside* the utility room—further into the room than in the exterior entryway—which location he marked on photograph Exhibit A (whereon he wrote: "power washer"). Guiriba, on the other hand, testified that Thompson told him that immediately after the fire she observed the pressure washer inside the utility room—"4 to 5-feet" away from the water heater.

To resolve this conflict in the evidence, it must first be determined if § 3319(c) is vague as to meaning and therefore, unenforceable. "The Board has held that a safety order will not be held void for uncertainty if any reasonable and practical construction can be given its language." (*Raisch Construction Co.*, Cal/OSHA App. 89-279, Decision After Reconsideration (Nov. 21, 1990) citing to *Duke Timber Construction, Co.*, Cal/OSHA App. 81-347, Decision After Reconsideration (Aug. 19. 1985).) In *Raisch Construction Co.*, the Board was concerned with the applicability of language in § 1592(a) that pertained to "areas with high ambient noise which obscures the audible alarm" required for "backing operations." There the Board held that: "[t]he mere fact that other safety standards regulate occupational noise by reference to specific decibel levels (e.g., "Control of Noise Exposure" in sections 5095-5100) does not support Employer's contention that such measurements are required in order for section 1592(a) to be enforceably clear."

Hence, it is immaterial that other safety orders have quantified distances[12] or established clearances to restrict access to a defined hazard. In *Kenko, Inc.*, Cal/OSHA App. 90-1101, Decision After Reconsideration (June 6, 1992), for example, the Board upheld a violation of § 2946(a)[13] against an employer because it "required or permitted" a backhoe operator, who allowed the backhoe boom to contact an overhead high-voltage power line, to operate its backhoe *in proximity* to energized high-voltage lines. In doing so, it re-affirmed its finding in *Whitney Farms*, Cal/OSHA App. 76-915, Decision After

[12] See e.g., § 5449(g) "Equipment within twenty feet horizontally and ten feet vertically, of any spraying operation and not enclosed in a spray booth, shall not produce sparks under normal operating conditions …."

[13] Section 2946(a), provides, in pertinent part, that an employer may not "require or permit any employee to perform any function in proximity to energized high-voltage lines . . . unless and until danger from accidental contact with said high-voltage lines has been effectively guarded against."

Reconsideration (July 24, 1978) that: " . . . a Section 2946(a) violation is established if the task assigned by the employer requires an employee to be *in proximity* to high-voltage lines, regardless of any warnings to the employee about the dangers from the wires." (italics added) The Board in *Kenko, Inc.*, went on to find that the fact that the backhoe operator contacted the overhead lines also "evidences a violation of these minimum clearances [the 6 or 10-feet of clearance in Tables 1 and 2] since Employer required him to operate the backhoe in proximity to the energized lines."

In *Nassco National Steel & Shipbuilding Co.*, Cal/OSHA App. 00-2743, Decision After Reconsideration (Oct. 17, 2002), the Board did not reach the issue of whether or not the safety order at issue in that case was rendered void because of the language utilized in the standard. There, the Board upheld the Administrative Law Judge's (ALJ's) finding that a violation of § 3650(m) was not established because proof was lacking as to *why* an unsecured load—T-beams involved in a forklift operation—was categorized as of "*excessive* width, length or height." The Board was not concerned with the meaning of the word excessive, having concurred with the ALJ's adoption of the dictionary definition of excessive[14]. It noted that "excessive is a relative term that requires a foundational comparison[15]", finding that:

> "In section 3650(m)[16] the predicate phrase "*Loads of excessive width, length or height,*" is an operative requirement. There must first be a finding that the subject load is excessively *wide, long, or high* in order to establish a violation that the load was not so balanced, braced and secured as to prevent tipping and falling." (final footnote omitted) (*Nassco National Steel & Shipbuilding Co.*)[17]

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[14] "Exceeding a reasonable degree of propriety, necessity, or the like; extreme; inordinate … beyond a normal or proper limit … excessive … describes a quantity, amount, or degree that is beyond what is specified, required, reasonable, or just." (*The American Heritage Dictionary of the English Language* (1980)

[15] The basis for such comparison should be based upon appropriate reference material, the witness's experience, consultation with experts on the subject matter, or some other competent foundational evidence. We question whether a "common sense" standard, unless more clearly defined by the witness, will ever pass our foundational test.

[16] Employer was cited for a violation of section 3650(m) [Industrial Trucks] which states: "Loads of excessive width, length or height shall be so balanced, braced, and secured as to prevent tipping and falling." Section 3650(m) is contained in Article 25 of the General Industrial Safety Orders [GISO]. The word "excessive" is not defined in the definition section of Article 25 [§3649] nor is it defined in the GISO definitions [§3207(a)].

[17] The Board went onto state that: "[The District Manager's] testimony that the 20-foot long T-beams were "excessively long" was opinion testimony and he did not state the basis for his opinion, other than common sense. The ALJ did not credit [his] testimony

In an analogous factual content involving vapors—welding fumes—the Board looked at the use of the phrase "at or near the point of release" of hazardous gases in § 4853(d)[protection from inert-gas metal-arc welding on stainless steel]. In *Broadway Sheet Metal*, Cal/OSHA App. 90-1355, Decision After Reconsideration (Nov. 23, 1992), the Board found that a canopy-type hood located 5-feet above the welding work surface did not constitute an appropriate "local exhaust ventilation" because it did not come within the definition of that term—"a mechanical ventilation system in which a hood is located at or near the point of release of dusts, fumes, mists, vapors or gases." The Board specifically held that a canopy hood located five feet away from the welding operation was not "at" the release point. It rejected the employer's further argument that the hood was "near" the release point in compliance with the safety order because one dictionary definition of "near" is "close in distance, time or degree." In so doing the Board stated:

> "The Board cannot adopt Employer's broad definition of "near", because it would defeat the purpose of the safety order, which is to prohibit certain types of welding on stainless steel 'unless exposed employees are protected.' In the present case, it is apparent that such protection was not afforded the welder. The ventilation device was not close enough to the welding to prevent the fumes from entering the welder's breathing zone."

In *Broadway Sheet Metal*, *supra*, the Board found that the cited safety order was not unenforceably vague. Paraphrasing its holding in Ra*isch Construction Co.*, *supra*, the Board stated that: "[T]he mere fact that 'near' is not quantified by some measurement does not render the safety order vague." It went on to hold that:

> "The judge's finding that "near" cannot be construed to permit hazardous fumes to pass through the employee's breathing zones is appropriate in light of the hazard defined by the safety order and the stated goal of protecting the welder from it." (*Broadway Sheet Metal*, *supra*.)

Based on the above-cited cases, it is found that the use of the word "near" in § 3319(c) does not render the safety order unenforceably vague.

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that a 20-foot long T-beam is *excessively long* and found it to be inadmissible, since it lacks an evidentiary foundation as proper lay or expert opinion testimony. … [t]he Division did not provide any proof of the meaning of 'excessive' in terms of evidence of what was *standard* or *normal* for this type of T-beam forklift operation, so as to establish the excessive nature of the *length* of these T-beams."

It is well settled that when a safety order does not supply a definition for a term used in a section, the Appeals Board applies the common usage or common law meaning, in the absence of evidence of a contrary meaning. (*D. Robert Schwartz dba Alameda Metal Recycling and Alameda Street Metals,* Cal/OSHA App. 96-3553, Decision After Reconsideration (Mar. 15, 2001) citing *Kenneth L. Poole, Inc.,* Cal/OSHA App. 90-278, Decision After Reconsideration (Apr. 18, 1991).) The Board has recognized that words should be given their meaning in ordinary use, and that dictionary definitions are often used for this purpose. (*The Home Depot USA, Inc.*, Cal/OSHA App. 99-690, Decision After Reconsideration (Mar. 21, 2002), footnote 2). "Near" is not specifically defined in the safety order or in the General Industrial Safety Orders (GISO) definitions section [§ 3207(a)]. "Near" (used as an adverb) is defined as "at a short distance in space or time." As an adjective, it is defined as "close in distance or time." (Webster's New World Dictionary and Thesaurus, Second Edition (2002) p. 1312.)

The employer in *Broadway Sheet Metal*, *supra*, failed to comply with the condition of providing local exhaust ventilation because the vent hood was not "near" or *not close enough* to the release of gas fumes to protect the welders, whereas here, the question is whether the refueling operation was performed *too close* to or "near" the source of ignition at the water heater. No matter which inquiry is conducted, the word "near" must be interpreted consistent with "the California Supreme Court's directive to liberally interpret *safety orders* to promote a safe and healthful working environment" (*Broadway Sheet Metal*, *supra*, at pg. 3, italics added), citing to Carmona v. Division of Industrial Safety (1975) 13 Cal.3d 303, 313, and Lusardi Construction Co. v. California Occupational Safety & Helath App. Bd. (1991) 1 Cal.App.4th 639, 645. While the court in *Carmona*, *supra*, was referring to Labor Code § 6306 when it stated (at pg. 313) that "…the terms of the legislation are to be given a liberal interpretation for the purpose of achieving a safe working environment", the Board has applied that principal to the interpretation of language in safety orders. (See also Labor Code § 3202[18])

Alcantara's testimony that he fueled the pressure washer with gasoline while it was within the doorway some "two meters"[19] from the water heater's

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[18] Labor Code § 3202 directs courts to liberally construe Division 4 ("Workers' Compensation and Insurance") and Division 5 "Safety in Employment" of the Labor Code "with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Division 5 includes the California Occupational Safety and Health Act of 1973 (the Act.)

[19] In the metric system, a meter is equivalent to 39.37 inches. *Second College Edition, The American Heritage Dictionary* (copyright 1982). pg. 790.

pilot light is not convincing, given the conflicts inherent in his testimony (as discussed above). Store manager Chavez, who was responsible for supervising Alcantara, testified that the pressure washer was in "the middle" of the yellow doorway after the accident, which location she marked on Exhibit A. However, Assistant Fire Marshall Keefer, who arrived on the scene immediately after the fire, is the most objective witness, having no stake whatsoever in the outcome of the events. He identified the "power washer" (depicted in Exhibit 3) as being completely inside the utility room. His opinion that gas vapors ignited at the pilot light, causing a fire, when the gasoline was poured, and explanation for how this might have occurred is credible. He opined that since gas vapors are heavier than air, they "fell to the ground and moved through out the room via air currents." Guiriba testified credibly that assistant supervisor Thompson told him that the pressure washer was "4 to 5-feet" away from the water heater after the explosion; and that the "yellow door" to the utility room was closed.

Based on the credible testimony of Keefer, Guiriba and Thompson, it is found that the pressure washer was "4 to 5-feet" from the water heater and hence, was "near" the hot water heater at the time of the accident. Interpreting the word "near" in this manner protects employees from the hazards inherent in refueling internal combustion engines with flammable liquids near an open flame and gives the safety order the liberal construction mandated by law. (See also Bendix Forest Products Corp. v. Division of Occupational Safety and Health, (1979) 25 Cal.3d 465, 470.)

Employer did not challenge the violation's classification and penalty. Those issues are therefore waived, and the violation and corresponding classification is established by operation of law. [See § 361.3 ("Issues on Appeal"); *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Decision After Reconsideration (Dec. 24, 1986); and *Bourgeois, Inc.*, Cal/OSHA App. 99-1705, Denial of Decision After Reconsideration (Apr. 26, 2000).]

## Decision

### Docket 03-R1D3-4116

Employer's appeal of Citation 1, Items 1 and 2, is denied.

### Docket 03-R1D3-4117

Employer's appeal of Citation 2, Item 1, is denied.

BREF FRENCH
Administrative Law Judge

Dated: December 15 , 2005